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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
A. The Lessons of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274	5
B. The Pre-*Wright Line* Law on Mixed-Motive Discharges Under the Wagner Act and the Taft-Hartley Act	9
C. The Board's and First Circuit's *Wright Line* Decisions	21
D. The Proper Outcome of This Case	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES	Page
Acme Evans Co., 24 N.L.R.B. 71 (1940), *enf'd*, 130 F.2d 477 (7th Cir. 1942), *cert. denied*, 318 U.S. 772	14
American Ship Building Co. v. NLRB, 380 U.S. 300 (1965)	20
Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977)	9
Armour & Co., 25 N.L.R.B. 989 (1940)	14
Associated Press v. NLRB, 301 U.S. 103 (1937)	10
Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946)	8, 16
Bodolay Packing Machinery Inc., 263 N.L.R.B. No. 38 (1982)	21
Carey v. Piphus, 435 U.S. 247 (1978)	9
Carl L. Norden, Inc., 62 N.L.R.B. 828 (1945)	15
Carl Pick Mfg. Co., 1 Decisions of the NLRB 161 (1934)	13
Cochran Shoe Co., 2 NRA Reporter 90 (1933)	13
Commonwealth Telephone Co., 13 N.L.R.B. 317 (1939)	16
Consumers Research Inc., 2 N.L.R.B. 57 (1936)	13
Davis Precision Machine Co., 64 N.L.R.B. 529 (1945)	16
Differential Steel Car Co., 75 N.L.R.B. 714 (1948), *enf'd*, 179 F.2d 241 (6th Cir. 1949)	19
EEOC v. Associated Dry Goods, 449 U.S. 590 (1981)	17
Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727 (1931), *enf'd*, 119 F.2d 903 (8th Cir. 1941)	17
E. Hubschman & Sons, Inc., 14 N.L.R.B. 225 (1939)	16
East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977)	9
East Texas Motor Freight, 262 N.L.R.B. No. 101 (1982)	21
Fairmont Creamery Co., 75 N.L.R.B. 1380 (1947), *enf'd*, 169 F.2d 169 (10th Cir. 1948)	14
F. W. Woolworth Co., 25 N.L.R.B. 1362 (1940), *enf'd*, 121 F.2d 658 (2d Cir. 1941)	10

TABLE OF AUTHORITIES—Continued

Page

First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) 20
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 11
General Cigar Co., Decisions of the Nat'l Labor Bd., Pt. 1, p. 71 (1934) 13
Herman Brothers, Inc., 252 N.L.R.B. 848 (1980). 21
Hillside Bus Corp., 262 N.L.R.B. No. 152 (1982) 21
Idaho Refining Co., 47 N.L.R.B. 1127, *enf'd*, 143 F.2d 246 (9th Cir. 1944) 16
Interlake Iron Corp., 33 N.L.R.B. 613 (1941), *enf. denied*, 131 F.2d 129 (7th Cir. 1942) 10
Kawasaki Motors Corp., 257 N.L.R.B. 502 (1981) 21
Kokomo Sanitary Pottery Corp., 26 N.L.R.B. 1 (1940) 16
Leyser Aluminum Co., 37 N.L.R.B. 839 (1941) 10
Litton Mellonics Systems Division, 258 N.L.R.B. No. 84 (1981) 21
Lone Star Gas Co., 52 N.L.R.B. 1058 (1943) 14
Louisville Refining Co., 4 N.L.R.B. 844 (1938), *enf'd*, 102 F.2d 678 (6th Cir. 1939), *cert. denied*, 308 U.S. 568 14
Magnesium Casting Co., 259 N.L.R.B. No. 64 (1981) 21
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 11
Montgomery Ward & Co. v. NLRB, 107 F.2d 555 (7th Cir. 1939) 10
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) ..... *passim*
National Licorce Co. v. Labor Board, 309 U.S. 350 (1940) 20
NLRB v. Brown, 380 U.S. 278 (1965) 19
NLRB v. Erie Resistor Co., 373 U.S. 221 (1963) 19
NLRB v. Great Dane Trailers Inc., 388 U.S. 26 (1966) 19
NLRB v. Jones & Laughlin Corp., 301 U.S. 1 (1937) 19

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir. 1938), *cert. denied*, 304 U.S. 576	15, 17
NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989	*passim*
Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933)	17
Perry v. Sindermann, 408 U.S. 593 (1972)	6-7
Phelps Dodge Corp., 28 N.L.R.B. 442 (1940)	10
Phelps Dodge Corp. v. Labor Board, 313 U.S. 177 (1941)	20, 21
Phoenix Mutual Life Ins. Co., 73 N.L.R.B. 1463 (1947), *enf'd*, 167 F.2d 983 (7th Cir. 1948), *cert. denied*, 335 U.S. 845	14
Power Reactor Co. v. Electricians, 367 U.S. 396 (1961)	17
Radio Officers Union v. NLRB, 347 U.S. 17 (1954)	19
Republic Creosoting Co., 19 N.L.R.B. 267 (1940)	14
Reynolds Int'l Pen Co., 70 N.L.R.B. 932 (1946), *enf. denied*, 162 F.2d 680 (7th Cir. 1947)	16
Robbins Tire & Rubber Co., 69 N.L.R.B. 440 (1946)	16
Salmon & Cowin Inc., 57 N.L.R.B. 845 (1944), *enf'd*, 148 F.2d 941 (5th Cir. 1945)	16, 17
SEC v. Chenery, 318 U.S. 80 (1943)	24
St. Jopseph Hospital Corp., 260 N.L.R.B. No. 89 (1982)	21
Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931)	8, 16
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	7, 11
The Dow Chemical Co., 13 N.L.R.B. 993 (1939), *enf'd*, 117 F.2d 455 (6th Cir. 1941)	15
The Life Ins. Co. of Virginia, 65 N.L.R.B. 1140 (1946)	16
Union City Body Co., 69 N.L.R.B. 172 (1946)	14
United Dredging Co., 30 N.L.R.B. 739 (1941)	15
University of California Regents v. Bakke, 438 U.S. 265 (1978)	11

TABLE OF AUTHORITIES—Continued

	Page
Walter Stover, 15 N.L.R.B. 635, 642 (1939), *enf. denied on other grounds*, 114 F.2d 513 (10th Cir. 1940)	14
West Boylston Mfg. Co., 87 N.L.R.B. 808 (1949)	19
Western Union Telegraph Co., 83 N.L.R.B. 238 (1949)	19
Westinghouse Pacific Coast Brake Co., 89 N.L.R.B. 145 (1950)	19
West Oregon Lumber Co., 20 N.L.R.B. 1 (1940)	15
Wright-Hibbard Industrial Electric Truck Co., 67 N.L.R.B. 897 (1947)	16
Wright Line, 251 N.L.R.B. 1083 (1980), *enf'd on an alternate ground*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989	*passim*
MISCELLANEOUS	
S. Rep. No. 573, 74th Cong., 1st Sess. 11	12-13
H.R. Rep. 510, 80th Cong. 1st Sess.	18
9 J. Wigmore, Evidence § 2489 (3d ed. 1940)	7
Leg. Hist. of the LMRA	19
NLRB 3rd Annual Report (1938)	14
NLRB 4th Annual Report (1939)	14
NLRB 5th Annual Report (1940)	14
NLRB 6th Annual Report (1941)	14
NLRB 7th Annual Report (1942)	14

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 99 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises out of an unfair labor practice charge filed by Teamsters Local 404 contending, *inter alia*, that the respondent had violated §§ 8(a)(1) & (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (3) ("NLRA" or "the Act"), by discharging one Sam Santillo. Santillo was fired within a week after he had initiated an organizing campaign seeking to have the

union designated as the bargaining representative for respondent's employees. The record here contains ample evidence from which a trier of fact could find that Santillo's union activity was at least one of the reasons that had motivated respondent to discharge him. The record also indicates that Santillo had engaged in certain conduct, not protected by the Act, which might have provided a basis for discharge.

At issue here is the proper allocation of the burden of persuasion on the various issues that arise in a case of this type.[1] The National Labor Relations Board ("NLRB" or "the Board") and the First Circuit have developed conflicting rules for allocating that burden; it is our submission here that neither the Board's nor that court's rules accord with Congress' intent.

In *Wright Line*, 251 N.L.R.B. 1083 (1980), *enf'd on an alternate ground*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, the NLRB adopted for such cases what the Board termed "an analysis akin to that used by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)." 251 NLRB at 1083. As described by the Board that analysis is as follows:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the

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[1] To avoid any possible confusion, it should be clearly stated at the outset what is *not* at issue here. No question is presented in this case as to the quantum of evidence sufficient to support a finding that union activity was a motivating factor in a discharge decision, or as to the circumstances in which such a motivation may be inferred from evidence before the Board. Those issues are important —and complicated—in their own right, but they are not raised here. The Board made no finding as to whether union activity was a motivating factor in the instant discharge, and the First Circuit expressed no opinion as to whether the evidence would be sufficient to support such a finding were it to be made. And, in any event, the evidence here plainly would justify such a finding on any likely legal standard. *See* n.20, *infra*.

> inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [251 N.L.R.B. at 1089]

Wright Line was appealed to the First Circuit which "disagree[d] with the Board," 662 F.2d at 904, and staked out the following alternative position:

> The Board may properly provide . . . that 'Once [a *prima facie* showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.' The 'burden' referred to, however, is a burden of going forward to meet a *prima facie* case, not a burden of persuasion. . . .[9]

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[9] . . . Let there be no mistake here either. The burden of persuasion *on all issues of disputed fact* rests at all times with the general counsel.

[*Id.* at 905 & n.9 (citations omitted; emphasis added)]

In the instant case, the Board and the First Circuit adhered to their respective positions. The Board found "that the General Counsel has established by strong and credible evidence a *prima facie* case for finding that Santillo was discharged in violation of Section 8(a)(3)" (Pet. App. 12a) and that "Respondent has failed to meet its burden of *overcoming* the General Counsel's *prima facie* case by establishing by competent evidence that Santillo would have been discharged, even absent his union activities" (*id.* 13a; initial emphasis added). The First Circuit regarded these findings as insufficient since, in its view, the Board may "impos[e] upon the Company [only] the burden of *neutralizing* . . . the General Counsel's *prima facie* case" (*id.* 3a; emphasis in original). Thus, the First Circuit "remand[ed] this case to the Board for reconsideration under the standard of [the First Circuit in] *NLRB v. Wright Line, supra,*" (*id.*).

Although the disagreement between the Board and the First Circuit which gives rise to the instant case is phrased in highly technical terms, the proper resolution of the controversy, as we show, requires a decision on a fundamental substantive question under the NLRA: what constitutes a violation of § 8(a)(3)? For while the First Circuit is correct in asserting that the burden of persuasion to establish a violation of the Act is at all times placed on the General Counsel, it is our submission here that the Board and the First Circuit each has erred by blurring—and thereby treating in a unitary fashion—two issues which, as *Mt. Healthy* recognizes, are analytically distinct. *See* Part A *infra*, pp. 5-9.

The first issue—the factual issue of "what happened" (*viz*, was an improper consideration in fact a "motivating factor" in the discharge decision)—is determinative of whether a § 8(a)(3) violation occurred; on that issue the burden of persuasion is on the General Counsel. But, as we demonstate, the second issue—the hypothetical question of "what would have happened" (*viz*, would the employee have been discharged if the improper consideration had not entered into the decision)—is purely a remedial issue, one whose resolution determines the propriety of the remedies of reinstatement and backpay; on that issue the burden of persuasion is properly placed upon the employer. *See* Parts B and C *infra*, pp. 9-24.

In our view, then, both the Board and the First Circuit have improperly allocated the burden of proof in cases of this type. The Board has erred by holding that on the first issue the burden of persuasion shifts to employers once the General Counsel has made a "*prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision"; thus, in this case the Board found a § 8(a)(3) violation without finding that a preponderance of the evidence supports the inference that Santillo's union activity was a motivating factor in his discharge. And the First Circuit has erred by holding that the Gen-

eral Counsel bears the burden of persuasion not only on this liability issue but also on the subsequent remedial issue of whether the employee should be denied the normal remedy of reinstatement with backpay because the employee would have been discharged even if he had not engaged in the protected conduct. Therefore, while we agree with the First Circuit that a remand is appropriate here, that remand should only be for the Board to determine whether the General Counsel carried its burden on the liability issue (and not, as the First Circuit has directed, for such a determination on both issues). *See* Part D *infra*, pp. 24-25.

ARGUMENT

A. The Lessons of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274

Because the Board based its *Wright Line* decision on this Court's *Mt. Healthy* decision—stating that it was "adopti[ng] the *Mt. Healthy* test," 251 N.L.R.B. at 1089—and because the First Circuit in *NLRB v. Wright Line* agreed that *Mt. Healthy* "presented issues . . . very similar to those raised in the labor context," 662 F.2d at 903, analysis here appropriately begins with *Mt. Healthy*.

Mt. Healthy was brought by a discharged public school teacher who had been given several reasons for his discharge, one of which was that the teacher had furnished information concerning the school's operations to a radio station. Plaintiff contended that his disclosure of the information was protected by the First Amendment and that therefore his discharge was unconstitutional; plaintiff sought reinstatement (with backpay) as a remedy for the alleged wrong.

The *Mt. Healthy* Court began by agreeing with plaintiff that his "communication was protected by the First and Fourteenth Amendments." 429 U.S. at 284. The Court concluded, however, that plaintiff was not necessarily entitled to reinstatement, reasoning that plaintiff should not be

> "place[d] . . . in a better position as a result of the exercise of the constitutionally protected conduct than he would have occupied had he done nothing. . . . The constitutional principle at stake is sufficiently vindicated if [plaintiff] is placed in no worse a position than if he had engaged in the [protected] conduct." [*Id.* at 285-86.]

Thus, if "quite apart from such [protected] conduct [his] record was such that he would not have been rehired in any event," *id.* at 286, plaintiff was not entitled to reinstatement.

The Court then announced the following rule governing the allocation of the burden of proof:

> Initially, in this case, the burden was properly placed upon respondent [plaintiff] to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [*Id.* at 287]

The *Mt. Healthy* opinion does not expressly develop the underlying reasons for so allocating the burden of proof. But the context provided by other decisions of this Court leaves little in the way of doubt as to the basis on which that rule rests.

Just a few years before *Mt. Healthy* was decided, the Court, in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), another case involving the discharge of a public employee, explained the import of the First Amendment for public employee discharges. The Court stated:

> [E]ven though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government

> may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible. [Citations omitted]

The essence of the constitutional violation alleged in *Mt. Healthy* was that the School Board had acted upon one of those "reasons upon which the government may not rely." The burden of persuasion was placed upon the plaintiff on this issue because in any civil case the plaintiff bears the burden of proving that a wrong has occurred. And this burden on the plaintiff never shifts. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), *quoting* 9 J. Wigmore, Evidence § 2489 (3d ed. 1940) ("the burden of persuasion 'never shifts'").[2]

Once the plaintiff proved in *Mt. Healthy* that the School Board had acted on an impermissible basis, under *Perry* the plaintiff had established a constitutional wrong. The remaining inquiry—whether the same decision would have been made absent the impermissible consideration—is of a different nature: an inquiry not into what had in fact happened but into what would have

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[2] *Burdine* is entirely consistent with *Mt. Healthy*. *Burdine*, a Title VII case, dealt with the first issue that arises in an employment discrimination case, a First Amendment case or a § 8(a)(3) case: whether the challenged decision was impermissibly motivated. *Burdine* teaches that on that issue, which is determinative of whether a wrong occurred, the burden of persuasion is on the plaintiff and never shifts. But *Burdine* does not hold that the burden of persuasion must be placed upon the plaintiff with respect to remedial issues that arise only after the plaintiff carries his burden of persuasion and establishes a wrong.

happened had the School Board not acted on an improper consideration. That inquiry was undertaken to determine whether the remedy of reinstatement is necessary to put plaintiff in the position he would have occupied but for the constitutional violation or whether, instead, that remedy would give plaintiff a windfall. In *Mt. Healthy's* words, resolution of the "but for" question is required to decide whether the discharge "amount[ed] to a constitutional violation *justifying remedial action*." 429 U.S. at 285 (emphasis added).[3]

Given *Mt. Healthy*'s understanding that the issue whether the plaintiff would have been discharged absent his protected conduct is a remedial issue, it is not surprising that the Court placed the burden of persuasion on the defendant on that issue. For it is well-established in this Court's jurisprudence that "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). *See also Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931). And that principle requires that a defendant who has acted upon a constitutionally impermissible consideration in discharging an employee (and thus has committed a wrong) bear the burden of persuasion—or the risk of nonpersuasion—on whether the same decision would have been made absent the impermissible consideration (and thus whether the remedy of reinstatement is appropriate).

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[3] Significantly, in deciding that the remedy of reinstatement would not be required if the teacher would have been discharged in any event, the *Mt. Healthy* Court relied on a series of criminal law decisions in which a constitutional violation (e.g., an illegal arrest) had been established (or assumed) and in which the question—plainly one of remedy—was whether that violation had "tainted" a subsequent event such as a confession or a guilty plea so as to require suppression of the confession or plea. 429 U.S. at 286.

Mt. Healthy teaches two critical lessons. First, a constitutional violation is established if a public employer in fact acts upon an improper consideration, and the plaintiff bears the burden of so proving. Second, even if the plaintiff carries that burden, the remedy of reinstatement is not proper if the same decision would have been made in any event, and the defendant bears the burden of so proving.[4] As we now show, these lessons—which neither the Board nor the First Circuit has fully comprehended—are equally applicable in the NLRA context.

B. The Pre-*Wright Line* Law on Mixed-Motive Discharges Under the Wagner Act and the Taft-Hartley Act

Extended analysis is not required to show that in this § 8(a)(3) discharge case, as in a First Amendment case, proof that the employee's protected activity was a motivating factor in the discharge is necessary to establish a violation.[5] This Court long ago recognized that "[t]he Act permits a discharge for any reason other than union

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[4] The Court has applied these principles in several other contexts. *See, e.g., Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265-66, 270-71 n.20 (1977) (Equal Protection Clause); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) (Title VII; dictum) (if plaintiffs prove that their employment applications were rejected for racially discriminatory reasons, "the company was entitled to prove . . . that the [plaintiffs] had not been injured because they were not qualified and would not have been hired in any event"). *Cf. Carey v. Piphus*, 435 U.S. 247, 260 (1978).

[5] We use the phrase "motivating factor" here in the same sense that it was used in *Mt. Healthy* and *Arlington Heights*. For union activity to be a motivating factor in a decision, the activity must not only be "on the minds of those responsible for the decision" but also must "play a part in that decision," *Mt. Healthy*, 429 U.S. at 285. But union activity—like any other consideration—can be a "motivating factor" even if it was not the " 'dominant' or 'primary' " reason for the decision. *Arlington Heights*, 429 U.S. at 265. *See also* n.1 *supra*.

activity or agitation for collective bargaining with employees." *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937). Thus, in a case like this, unless an employee's union activity is proven to have, in fact, been a motivating factor in the employer's decision to discharge the employee, there is no basis for finding the discharge violative of § 8(a)(3).

Because proof of this fact is thus required to establish a violation of § 8(a)(3), it necessarily follows that the General Counsel must bear the burden of persuasion on the issue just as the plaintiff does under *Mt. Healthy*. As Judge Breyer stated in his concurring opinion below, "that the employer wins in a case where the record cannot be fairly said to make out a violation by a preponderance of the evidence . . . is surely what one would expect" (Pet. App. 5a). And § 10(c), 29 U.S.C. § 160(c), makes this requirement explicit by providing that the Board is to find a violation only "[i]f upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice," and that "[i]f upon the preponderance of the evidence, the Board shall not be of [that] opinion, then the Board shall . . . dismiss[] the . . . complaint."[6]

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[6] To be sure, the burden of *production* on the issue whether union activity was a motivating factor for the discharge—as on any issue—may shift if the General Counsel, in his case-in-chief, makes out a *prima facie* case that the employer was so motivated. As stated in *Montgomery Ward & Co. v. NLRB*, 107 F.2d 555, 560 (7th Cir. 1939), if "the evidence adduced to support the complaint gives rise to an inference that is sufficient to support an order based on § 8(3) of the Act" it then is "up to the employer to give an adequate 'explanation of the discharge' even though the burden of persuasion remains on the Board. . . ." *See also e.g., F. W. Woolworth Co.*, 25 N.L.R.B. 1362, 1374 (1940), *enf'd*, 121 F.2d 658 (2nd Cir. 1941); *Phelps Dodge Corp.*, 28 N.L.R.B. 442, 480 & n.77 (1940); *Interlake Iron Corp.*, 33 N.L.R.B. 613, 636 (1941), *enf. denied*, 131 F.2d 129 (7th Cir. 1942); *Leyser Aluminum Co.*, 37 N.L.R.B. 839, 850 & n.6 (1942). But, as the First Circuit has correctly stated, the employer's burden, in such circumstances, is "merely [to] 'come for-

It is common ground here that proof that a discharged employee's union activity was a motivating factor in the discharge decision does not necessarily end the inquiry, and that a determination may also be required on a second question—one also addressed in *Mt. Healthy*: would the employer have made the same decision absent the union activity.[7] The Board and the First Circuit in *Wright Line* each viewed the answer to that question as determinative of whether a violation occurred. The Board and that court differed only as to whether this inquiry concerns an affirmative defense to liability (in which case

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ward with enough evidence to convince the trier of fact that under the circumstances, there is no longer a preponderance of evidence' " establishing such a motivation, *NLRB v. Wright Line*, *supra*, 662 F.2d at 904. If, at the conclusion of all the evidence, the General Counsel has not established by a preponderance of the evidence that the discharged employee's union activity was a motivating factor in the discharge, the complaint must be dismissed.

In recent years, a set of rules governing the shifting of the burden of production has become an established feature of Title VII disparate treatment litigation as well. *E.g.*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *United States Postal Service v. Aikens*, No. 81-1044, the AFL-CIO, as *amicus curiae*, has questioned the utility of the rules that have been formulated in these cases for adjudicating whether race was a motivating factor of a challenged employment decision. But whatever the utility of the *McDonnell Douglas* rules may be in general, at least this much is clear: those rules were developed for, and apply to, cases in which the preponderance of the evidence shows that an employer has acted for legitimate or for illegitimate reasons but not for both; thus *McDonnell Douglas* culminates in an inquiry into whether proffered nondiscriminatory reasons for a challenged decision are pretextual. By their terms, then, the *McDonnell Douglas* rules do not apply to cases which involve a mixed-motive decision, in which a proffered justification may be neither pretextual nor the complete reason for the decision.

[7] The question is presented where—but only where—the evidence shows that a permissible factor also was a motivating factor in the discharge decision. *See University of California Regents v. Bakke*, 438 U.S. 265, 321-22 n.54 (1978) (Powell, J.).

the burden would be on the employer, as the Board held) or whether it was a necessary element of the General Counsel's case-in-chief (in which case the burden would be on the General Counsel, as the First Circuit held). Both the Board and the First Circuit have misconceived the issue.

The hypothetical question as to what the employer would have done had he not been motivated, in part, by an anti-union animus is relevant not to determine whether a violation has occurred but whether the remedy of reinstatement is appropriate to cure the violation. Under § 8(a)(3), as under the First Amendment, there are certain reasons upon which the employer may not rely in making decisions and if the employer in fact does so rely he commits a wrong and may be subject to a cease-and-desist order enjoining such conduct regardless of whether there were legitimate bases upon which the employer might have reached the same decision had he not taken the impermissible factor into account. The latter question is relevant only in determining whether the remedy of reinstatement with backpay is appropriate to cure the wrong—if the employee would have been discharged even absent his union activity, reinstatement with backpay would give him a windfall. And because the issue of what would have happened but for the unlawful consideration of the employee's union activity is a remedial issue, the burden of persuasion here, as in *Mt. Healthy*, is properly placed upon the wrongdoing employer (who is seeking to avoid the remedy of reinstatement with backpay) to prove that the employee would have suffered the same injury in the absence of the wrong.

1. (a) *The Wagner Act.* Section 8(a)(3) was originally enacted by Congress in 1935 as § 8(3) of the Wagner Act. The sponsors of that Act explained the purpose of the section as follows:

> Of course, nothing in the bill prevents an employer from discharging a man for incompetence; from ad-

> vancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work. [S. Rep. No. 573, 74th Cong., 1st Sess. 11]

Given this legislative intent (as well as the language of § 8(3) itself) it was evident from the very enactment of the Wagner Act that a discharge based solely on, e.g., "incompetence," does not violate § 8(3). It was equally obvious that a discharge of an employee solely because of union activity does violate the Act. The interesting question concerned "mixed-motive" discharges, *viz.*, discharges actuated by both proper and improper considerations.

(b) *The NLRB's 1935-1947 Decisions.* Almost immediately after the passage of the Act, the Labor Board, which Congress had created to administer the Act, confronted this question.[8] In one of its earliest decisions, *Consumers Research Inc.*, 2 N.L.R.B. 57, 73 (1936), the Board rejected an employer's argument that proof of a permissible purpose established the lawfulness of a discharge, stating:

> The Act does not provide that, antecedent to a finding of a violation of the Act, it must be found that

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[8] The same issue had arisen, prior to the enactment of the Wagner Act, under § 7(a) of the National Industrial Recovery Act. The National Labor Board, which administered the NIRA, had squarely held that an "employer, in dismissing an employee, must not be actuated *in any degree whatsoever* by the latter's union affiliation or activities." *General Cigar Co.*, Decisions of the Nat'l Labor Bd., Pt. 1, p. 71 (No. 163, Feb. 6, 1934) (emphasis added). *See also Cochran Shoe Co.*, 2 NRA Reporter 90 (Case No. 170, Feb. 16, 1933); *Carl Pick Mfg. Co.*, 1 Decisions of the NLRB 161 (No. 97, Nov. 10, 1934).

> the sole motive for discharge was the employee's union activity. Such an interpretation is repugnant to the purpose and meaning of the Act and . . . may not be made.

Two years later, in *Louisville Refining Co.*, 4 N.L.R.B. 844, 861 (1938), *enf'd*, 102 F.2d 678 (6th Cir. 1939), *cert. denied*, 308 U.S. 568, the Board articulated the converse of this proposition, holding that so long as an anti-union animus was a "definite factor" in a discharge decision, a violation of § 8(3) is established regardless of what other factors may have entered into the employer's decision. Thus, by the time of its Third Annual Report, issued in 1938, the Board advised Congress (at p. 70):

> Where the employer has discharged an employee for two or more reasons and one of them is union affiliation or activity, the Board has found a violation [of § 8(3)].

The Board continued to so hold in a long line of subsequent decisions,[9] and to so state its holding in its annual reports.[10] The rule that emerged was quite clear: employer conduct violated § 8(3) if motivated "in whole *or in part*" by anti-union animus, *Walter Stover*, 15 N.L.R.B. 635, 642 (1939) (emphasis added), *enf'd*, 114

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[9] *See e.g.*, *Republic Creosoting Co.*, 19 N.L.R.B. 267, 293-94 (1940); *Lone Star Gas Co.*, 52 N.L.R.B. 1058, 1060 (1943); *Acme Evans Co.*, 24 N.L.R.B. 71, 90 (1940), *enf'd*, 130 F.2d 477 (7th Cir. 1942), *cert. denied*, 318 U.S. 772; *Union City Body Co.*, 69 N.L.R.B. 172, 186 n.18 (1946); *Phoenix Mutual Life Ins. Co.*, 73 N.L.R.B. 1463, 1478 (1947), *enf'd*, 167 F.2d 983 (7th Cir. 1948), *cert. denied*, 335 U.S. 845; *Fairmont Creamery Co.*, 73 N.L.R.B. 1380, 1385 (1947) *enf'd*, 169 F.2d 169 (10th Cir. 1948); *Walter Stover*, 15 N.L.R.B. 635, 642 (1939), *enf'd denied on other grounds*, 114 F.2d 513 (10th Cir. 1940); *Armour & Co.*, 25 N.L.R.B. 989, 1000 (1940). *See also* cases cited, nn.12-14, *infra*.

[10] *See* NLRB 4th Annual Report at 60 (1939); NLRB 5th Annual Report at 37, 38 (1940); NLRB 6th Annual Report at 45 (1941); NLRB 7th Annual Report at 46 (1942).

F.2d 513 (10th Cir. 1940), "whether or not the [employer] may have some other motive . . . and without regard to whether or not the [employer's] asserted motive was lawful," *The Dow Chemical Co.*, 13 N.L.R.B. 993, 1023 (1939), *enf'd*, 117 F.2d 455 (6th Cir. 1941). Proof of such other motives was "immaterial," *West Oregon Lumber Co.*, 20 N.L.R.B. 1, 27 (1940); *Carl L. Norden, Inc.*, 62 N.L.R.B. 828, 831 n.12 (1945), in determining whether § 8(3) had been violated, even where it was claimed that other motives—lawful ones—had been "*controlling*" in the decision at issue, *United Dredging Co.*, 30 N.L.R.B. 739 (1941) (emphasis added).

While thus broadly defining the scope of § 8(3)'s prohibition, the Board, in a series of cases, also recognized the relevance of an employer's claim that the discharged employee would have lost his job in any event for reasons unrelated to his union activity. These decisions were based on, and usually relied on, *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir. 1938) (L. Hand, J.), *cert. denied*, 304 U.S. 576. There the employer, whose unlawful "refusal [to negotiate] was at least one cause of [a] strike," sought to avoid an order requiring reinstatement of the (unfair labor practice) strikers on the ground that the strike would have occurred even if the employer had not violated the Act. Judge Hand accepted the employer's premise that proof of that fact would defeat reinstatement. But Judge Hand concluded that since the employer's refusal to bargain was a wrong for which the employer was seeking to avoid a remedy, "it rested upon the tortfeasor"—that is, the employer—"to disentangle the consequences for which it was chargeable from those for which it was immune," of that fact would defeat reinstatement. But Judge *id.* at 862. Indeed, his choice of terms—one is a "tortfeasor" only after having been adjudged to have com-

mitted a tort—makes it manifest that Judge Hand viewed the "disentanglement" issue as a remedial issue not a substantive issue.[11]

The Board applied this same approach in § 8(3) cases in which the Board found a discriminatory discharge or a discriminatory refusal to reinstate following a strike, entertaining employers' claims that employees were not entitled to reinstatement and backpay because they would have lost their jobs in any event due to, *e.g.*, a decline in the employer's business,[12] a change in the employee's physical condition,[13] or the employee's misconduct.[14]

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[11] Judge Hand's reasoning paralleled the reasoning of this Court in *Story Parchment Co., supra*:

> Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced. [282 U.S. at 565]

And Judge Hand's reasoning anticipated this Court's subsequent decision in *Bigelow v. RKO Radio Pictures, supra*, as well as the decision in *Mt. Healthy*.

[12] *E.g., Commonwealth Telephone Co.*, 13 N.L.R.B. 317, 332 (1939); *E. Hubschman & Sons, Inc.*, 14 N.L.R.B. 225, 240 (1939); *Idaho Refining Co.*, 47 N.L.R.B. 1127, 1133-34, *enf'd*, 143 F.2d 246 (9th Cir. 1944); *Wright-Hibbard Industrial Electric Truck Co.*, 67 N.L.R.B. 897, 908 n.15 (1947); *Reynolds Int'l Pen Co.*, 70 N.L.R.B. 932, 933 (1946), *enf. denied*, 162 F.2d 680 (7th Cir. 1947).

[13] *Salmon & Cowin Inc.*, 57 N.L.R.B. 845, 846 n.1 (1944), *enf'd*, 148 F.2d 941 (5th Cir. 1945).

[14] *Davis Precision Machine Co.*, 64 N.L.R.B. 529, 537 (1945); *The Life Ins. Co. of Virginia*, 65 N.L.R.B. 1140, 1157 (1946); *Robbins Tire & Rubber Co.*, 60 N.L.R.B. 440, 454 n.21 (1946). *See also Kokomo Sanitary Pottern Corp.*, 26 N.L.R.B. 1, 18 (1940).

Most of the decisions cited in nn.10-11 clearly indicate that the question of whether the employee would have lost his job in any event was being considered in order to determine what remedy to order, rather than to decide whether a violation had occurred. In a few of those decisions however, and in all the decisions cited in this

These early decisions by the agency charged with enforcing the Act are strong evidence of Congress' intent in enacting the Wagner Act.[15]

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note, the Board's understanding of the relevance of the inquiry is less clear.

The petition for certiorari in this case (at 11-12) cites several of these ambiguous Board decisions and reads them to hold that the fact that an employee would have lost his job in any event was an affirmative defense which, if proved by the employer, established that the employer was innocent of any wrongdoing (even though the employer had, in fact, acted upon an impermissible consideration in discharging the employee). We respectfully suggest that this is not the better reading of those cases. First, none of the cases cited in the petition questions in any respect the by then well-established rule that action motivated in part by union activity violated § 8(3)—a rule which is inconsistent with the "affirmative defense" hypothesis. Second, each of the cited cases relied on *Remington Rand* which is undeniably a remedy case and which places the burden of persuasion on the employer precisely because he was shown to be a "tortfeasor." And third, in several of the cases cited herein (including *Salmon & Cowin Inc., supra*, cited in the petition as well) the Board clearly indicated that the "but for" inquiry was a remedial, rather than a liability, issue.

There is only one decision by the Board during this era, *Eagle-Picher Mining & Smelting Co.*, 16 NLRB 727 (1931), *enf'd*, 119 F.2d 903 (8th Cir. 1941) which squarely treated the issue of whether the employee would have lost his job but for his union activity as an affirmative defense. (*Borden Mills, Inc.*, 13 NLRB 459 (1939), on which the petition for certiorari relies, does not; all that it states is that "[e]ven on the *supposition*" that the but for issue is a "defense," the employer had not satisfied his burden of proof. *Id.* at 475). In *Eagle Picher* the Board offered no explanation for so doing and it relied, 16 NLRB at 801, on the remedial discussion in *Remington Rand*. For the reasons just discussed, this decision is aberrational, not the norm.

[15] *See, e.g., Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) (Cardozo, J.) ("a contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work effectively and smoothly while they are yet untried and new" is entitled to "peculiar weight"); *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961); *EEOC v. Associated Dry Goods*, 449 U.S. 590, 600 n.17 (1981).

(c) *The Taft-Hartley Act.* In 1947, Congress enacted the Labor Management Relations Act ("LMRA")—known as the Taft-Hartley Act—amending the Wagner Act in various respects. Significantly, however, Congress did not amend § 8(3)'s prohibition on discrimination but rather, reenacted that prohibition verbatim (as § 8(a)(3)); the section thus remains the product of the Seventy-Fourth Congress—the Congress responsible for the Wagner Act. There is not one word in the legislative history of the LMRA to suggest that in reenacting § 8(a)(3) Congress intended to alter its meaning nor is there any indication that Congress disagreed with the Board's repeated holding that the section is violated by employer conduct which is motivated in whole or *in part* by an anti-union animus.

To the extent that Congress expressed itself at all in 1947 on the subject of mixed motive discharges, it was in the consideration of amendments to the *remedial* section of the Wagner Act, § 10(c). The LMRA added the following sentence to § 10(c):

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

The Conference Committee which produced this language stated the purpose of the amendment as follows:

> [E]mployees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause will not be entitled to reinstatement. [H.R. Rep. No. 510, 80th Cong. 1st Sess. at 55, *reprinted* in 1 Leg. Hist. of the LMRA at 559]

That explanation, like the language and placement of the amendment, speaks to remedy not to violation. And

during a lengthy debate with Senator Pepper over the import of this amendment, Senator Taft, the floor manager of the bill, stated five separate times that the amendment "merely states the present rule," 2 Leg. Hist. at 1593, and that "there is no intention whatever to change the existing law," *id.* at 1594. *See also id.* at 1595.

(d) *The NLRB's Pre-*Wright Line *Taft-Hartley Decisions.* Following the enactment of the LMRA, the Board continued to hold that a discharge violated § 8(a)(3) if motivated in part by an improper consideration, as the Board acknowledged in *Wright Line.* 251 N.L.R.B. at 1084, 1087.[16] Those holdings are further evidence that Congress, in enacting that Act, had not intended to overturn the preexisting rules governing mixed-motive discharges. *See* p. 17 and n.15, *supra.*

2. In sum, for the forty-five years preceding *Wright Line*, the rules the Board applied in mixed-motive cases were analytically the same as the rules this Court eventually developed in *Mt. Healthy* and *Arlington Heights.* This parallel is not surprising. Determining whether an employer has commited a wrong, either under the First and Fourteenth Amendments or under § 8(a)(3),[17] requires an inquiry into the employer's motivation in taking the challenged action. That inquiry is complete when

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[16] Although not mentioned in *Wright Line*, the Board also continued to hold, after the enactment of the LMRA, that reinstatement would not be an appropriate remedy if the employer could prove that the employee would have been discharged without regard to his union activity. *E.g., Differential Steel Car Co.*, 75 N.L.R.B. 714, 730 (1948) *enf'd*, 179 F.2d 241 (6th Cir. 1949); *Western Union Telegraph Co.*, 83 N.L.R.B. 238, 239 (1949); *West Boylston Mfg. Co.*, 87 N.L.R.B. 808, 871 (1949); *Westinghouse Pacific Coast Brake Co.*, 89 N.L.R.B. 145, 146-47 (1950).

[17] *See, e.g., NLRB v. Jones & Laughlin Corp.*, 301 U.S. 1, 45 (1937); *Radio Officers Union v. NLRB*, 347 U.S. 17, 44 (1954); *NLRB v. Erie Resistor Co.*, 373 U.S. 221, 227 (1963); *NLRB v. Great Dane Trailers Inc.*, 388 U.S. 26 (1966); *NLRB v. Brown,*

it is found that the employer acted for an improper motive. The norm is that decision-makers do not, before acting, take a series of factors into account and then stop to evaluate each of those reasons for their decision to determine which of the reasons are necessary to the decision and which are surplusage. Thus, as we have stressed, the inquiry into what the employer would have done if he had acted free of the improper motivation that, in fact, actuated his action is, by its nature, a hypothetical inquiry rather than an attempt to determine what, in fact, occurred. Consequently, as *Mt. Healthy* teaches, that inquiry is not relevant in deciding whether the employer committed a wrong.

Indeed there is added reason, in the § 8(a)(3) context, to hold that an employer commits a wrong—and is subject at the least to a cease-and-desist order—by taking into account an improper consideration in making a decision. As this Court has held, the Labor Board exists "not for the adjudication of private rights" but to "act[] in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interestate commerce by encouraging collective bargaining." *National Licorice Co. v. Labor Board*, 309 U.S. 350, 362 (1940); *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 193 (1941). That public policy is offended when an employer acts for an improper purpose, whether or not the employer would have made the same decision in any event. Thus, it is peculiarly appropriate for the Board to vindicate the public policy embodied in the Act by issuing a cease-and-desist order against an employer who so acts, enjoining him from relying upon impermissible considerations in the future, regardless of whether

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380 U.S. 278, 286-87 (1965); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981).

the discharged employee would have suffered the same adverse employment consequence if the employer had not taken into account the impermissible factor.[18]

C. The Board's and First Circuit's *Wright Line* Decisions

1. In *Wright Line* the Board made a limited but important break with what is described, understatedly, as the rule the Agency had been following "[f]or a number of years," 251 NLRB at 1084. The Board in *Wright Line* held that even if a discharge is motivated in part by union activity, proof that the employee would have been discharged in any event constitutes a defense to a § 8(a)(3) charge (rather than simply a defense to the ordinary remedy of reinstatement).[19]

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[18] It has long been established in the Board's jurisprudence that a cease-and-desist order directed against a discriminatory discharge may issue even where reinstatement of the discharged employee is not an appropriate remedy. *See Phelps Dodge Corp. v. Labor Board, supra*, 313 U.S. at 194-95. Both the Board's and the First Circuit's *Wright Line* decisions, however, by blending the question of what motivated the employer with the question what would the employer have done absent an improper motive, leave little room for a determination that the employer acted improperly but that reinstatement is inappropriate as a remedy. Thus, in the post-*Wright Line* cases in which the Board has found that the employer carried its burden of persuasion on the question delineated in *Wright Line*, the Board has dismissed the complaint without regard to whether the employer had, in fact, been actuated by an improper motive. *Litton Mellonics Systems Division*, 258 N.L.R.B. No. 84 (1981); *Magnesium Casting Co.*, 259 N.L.R.B. No. 64 (1981); *St. Joseph Hospital Corp.*, 260 N.L.R.B. No. 89 (1982); *East Texas Motor Freight*, 262 N.L.R.B. No. 101 (1982); *Hillside Bus Corp.*, 262 N.L.R.B. No. 152 (1982); *Bodolay Packing Machinery Inc.*, 263 N.L.R.B. No. 38 (1982). Under the analysis developed herein, these decisions are erroneous insofar as dismissal of the complaint is ordered without regard to whether the employer, in taking the challenged action, had been motivated by an improper consideration.

[19] *See also Herman Brothers, Inc.*, 252 N.L.R.B. 848, 848 (1980); *Kawasaki Motors Corp.*, 257 N.L.R.B. 502 n.2 (1981).

As previously noted (pp. 2, 5 *supra*), the Board thought that it was adopting "the *Mt. Healthy* test" and justified its decision principally on that ground. But as we have seen, the Board's decision in *Wright Line* is inconsistent with *Mt. Healthy* by denominating the issue of whether the employee would have been discharged absent the impermissible consideration as a liability issue rather than a remedial one.

2. The First Circuit in *NLRB v. Wright Line*, *supra*, also held that this issue goes to liability (although the First Circuit disagreed with the Board's conclusion that the inquiry concerns an affirmative defense, viewing it instead as going to an element of the General Counsel's case-in-chief). Unlike the Board, however, the First Circuit recognized that it was departing from *Mt. Healthy* in so holding. The First Circuit's explanation for that departure cannot withstand analysis.

The First Circuit acknowledged that under *Mt. Healthy* a First Amendment violation is established by proof that protected activity is a motivating factor in the discharge decision, and that the question whether the protected activity was a "but for" cause of the discharge is a remedial one on which the employer bears the burden of proof:

> In *Mt. Healthy*, the employer conceded that he had fired the employee for speech activity which was later found to be fully protected under the first amendment. Thus, the "but for" test . . . applied only *after* . . . a violation had been proven by the employer's own admission. The employer's claim, then, was a true affirmative defense to a rehiring order—*i.e.*, the employer contended that notwithstanding his violation of the Constitution reinstatement was improper as a remedy because the employer had also been involved in an altercation with another teacher, an argument with cafeteria employees, and an incident in which he made obscene gestures to female students. The employer argued

> that these incidents, which were totally independent of the protected speech activity, justified the employee's dismissal *notwithstanding* the fact that the employer had violated the employee's constitutional rights. The employer's claim was thus a true affirmative defense which went to the appropriateness of the remedy being applied rather than to the existence of a violation in the first instance. [*NLRB v. Wright Line*, *supra*, 662 F.2d at 906 (emphasis in original; footnote omitted).]

The First Circuit also suggested that "on rare occasions" the same approach might be appropriate in a § 8(a)(3) case, if the employer "is not defending on the ground that the discharge was properly motivated, but rather on the theory that, notwithstanding the commission of an unfair labor practice, he should not have to take the particular person back." *Id.* at 906 n.11. But the First Circuit concluded that where the employer did defend the discharge as "properly motivated," the General Counsel bears the burden of proving not only that which was admitted in *Mt. Healthy* (and in the hypothetical case)—*viz.*, that an improper consideration was a motivating factor in the discharge decision—but also that which was disputed in *Mt. Healthy* and on which the burden was placed upon the employer—*viz.*, that the improper consideration was a "but for" cause of the discharge.

We are at a loss to understand the First Circuit's reasoning. That the employer denies an improper motivation means that the General Counsel must bear the burden of proving that the decision was based, in part, upon such motive. But if the General Counsel meets that burden the case then stands in the same posture as if the employer had admited the improper motivation. There is no reason to vary the allocation of the burden of proof on the *second* issue—the "but for" issue—because the

employer unsuccessfully defended on the *first* issue. The "but for" issue is either a remedial issue in all § 8(a)(3) cases or in none. And *Mt. Healthy* supports the former conclusion.

D. The Proper Outcome of this Case

While disagreeing with the First Circuit's analysis, we agree with that court that a remand is appropriate here. The Board's *Wright Line* test is not phrased so as to place on the General Counsel the ultimate burden of persuasion on the first issue; the Board requires only that the General Counsel make "a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" (pp. 2-3, *supra*). Once the General Counsel makes such a showing, he has no further burden under *Wright Line*, and the burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct" (*id.*).

Thus, the Board here found a violation without expressly finding that Santillo's union activity was a motivating factor in his discharge; all that the Board found was that the General Counsel established, *prima facie*, that the union activity was a motivating factor, and that respondent failed to show that Santillo would have been discharged in any event (*see* p. 3, *supra*). The Board's findings leave open the possibility, however slight, that respondent had *neutralized* the inference of discrimination created by the General Counsel's *prima facie* case and that the evidence was in equipoise as to whether union activity was a motivating factor in Santillo's discharge.

Under the principle of *SEC v. Chenery*, 318 U.S. 80 (1943), therefore, a remand is appropriate here for the Board to decide whether the preponderance of the evidence proves that Santillo's discharge was based, at least

in part, upon his union activity.[20] If the Board were to so find, a violation of § 8(a)(3) would, perforce, be established, and based upon the findings the Board has made—that respondent did not prove that Santillo would have been discharged in any event—the remedial order the Board has issued directing reinstatement and backpay would be appropriate.

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[20] We hasten to add that the evidence here plainly would support such a finding and may, indeed, compel it (in which case a remand might not be required). Santillo, one of respondent's most experienced employees, was discharged within one week after he initiated the union organizing campaign, and within one working day after the manager who fired Santillo stated that he (the manager) was "going to get even with Santillo" (Pet. App. 19a-20a, 24a, 29a). Santillo was not given three written warnings before being discharged, even though it was the Company's practice to do so (*id.* at 38a); indeed, Santillo was not cautioned or admonished at all. Of the three reasons that were offered to justify Santillo's discharge, two—that Santillo took coffee breaks during work hours and that he left the keys to the bus he drove in the bus when parked in the garage—were found to be pretextual in that other employees who engaged in identical conduct were not discharged (or even told their conduct was improper). *Id.* at 25a-28a, 29a-31a. And the third ground—that Santillo stopped at his home during work hours—while not shown to be pretextual (because there was no evidence as to whether other employees had engaged in such conduct)—was closely akin to the practice of employees taking coffee breaks during work hours which the respondent permitted so long as the breaks did not interfere with the drivers meeting their bus schedules.

The Administrative Law Judge found that "a preponderance of the evidence establishes that [the manager's] decision to discharge Santillo . . . was motivated by a desire to discourage union activities" (Pet. App. 39a,; indeed, the ALJ found that "Respondent would not have fired Santillo, one of his most experienced employees, but for his Union activities' (*id.*) It is not clear from the Board's opinion, however, which "affirm[ed] the rulings, findings, and conclusions of the Administrative Law Judge, *as clarified herein*," (Pet. App. 10a-11a; emphasis added) whether the Board intended to affirm these specific findings in its decision.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated, and the case should be remanded to that Court, for remand to the Board, with instructions for the Board to decide whether the General Counsel has proven that union activity was a motivating factor in the discharge at issue here.

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